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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 00 068 51014 Office: Vermont Service Center Date: 17 JAN 2002

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

[redacted] Public Copy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a home inspection company. It seeks to employ the beneficiary permanently in the United States as a secretary. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the filing date of the visa petition.

On appeal, counsel submits a brief and previously submitted evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is January 13, 1998. The beneficiary's salary as stated on the labor certification is $9.75 per hour or $20,280.00 per annum.

Counsel initially submitted a copy of the petitioner's Form 1120S

U.S. Income Tax Return for an S Corporation which reflected gross receipts of $120,403; gross profit of $120,403; compensation of officers of $75,600; salaries and wages paid of $0; depreciation of $0; and an ordinary income (loss) from trade or business activities of $6,942. Schedule L reflected total current assets of $1,778 in cash and total current liabilities of $1,188.

The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition. On September 26, 2000, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of January 13, 1998.

In response, counsel submitted a copy of the petitioner's 1999 U.S. Income Tax Return for an S Corporation which reflected gross receipts of $148,634; gross profit of $148,634; compensation of officers of $36,000; salaries and wages paid of $0; depreciation of $0; and an ordinary income (loss) from trade or business activities of $74,927. Schedule L reflected total current assets of $3,171 in cash and total current liabilities of $455.

The director determined that the additional evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel argues that the petitioner could have used his salary of $75,600 to pay the beneficiary's wage.

Counsel's argument that the salary paid to the petitioner could be used to pay the beneficiary's salary is not persuasive. These funds were not retained by the petitioner for future use. Instead, these monies were expended on compensating the petitioner, and therefore, not readily available for payment of the beneficiary's salary in 1998. Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage at the time of filing the application for alien employment certification as required by 8 C.F.R. 204.5(g)(2).

A review of the federal tax return for 1998 shows that when one adds the depreciation, the ordinary income, and the cash on hand at year end (to the extent that total current assets exceed total current liabilities), the result is $7,532, an amount less than the proffered wage.

A review of the federal tax return for 1999 shows that when one adds the depreciation, the ordinary income, and the cash on hand at

year end (to the extent that total current assets exceed total current liabilities, the result is $77,643, more than the proffered wage.

The petitioner, however, must show that it had the ability to pay the proffered wage at the time of filing of the petition. See 8 C.F.R. 204.5(g)(2).

Accordingly, after a review of the petitioner's federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition and continuing to present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.